



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 768 OF 2017

DAVID JOSEPH GICHAMBA GICHUHI 1ST PLAINTIFF

BEARTICE WANJIRU GICHAMBA 2ND PLAINTIFF

VERSUS

JANE WACEKE NJOROGE 1ST DEFENDANT

JOSEPH NDUNGU KAMAU 2ND DEFENDANT

LAND REGISTRAR THIKA 3RD DEFENDANT

THE HON. ATTORNEY GENERAL..... 4TH DEFENDANT

JUDGMENT

By a Plaint dated 29th May 2012, the Plaintiffs sought for the following orders;

- a. A Declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Plot No. RUIRU EAST/BLOCK. 1/1661, (the suit property) and accordingly that the 1st Defendant is a trespasser on the same.
- b. A Permanent Injunction against the 1st Defendant, whether by herself, her servants or agents and/or otherwise howsoever from wrongfully entering, remaining, or continuing in occupation of the suit property without the permission / authority of the Plaintiffs.
- c. An order of eviction of the 1st Defendant from the suit land Plot No. RUIRU EAST/BLOCK. 1/1661.
- d. An Order to discharge the restriction placed on the title deed.
- e. Costs of this suit together with interest thereon at such rate and for such period of time as Court may deem fit to grant.

The Plaintiffs averred in their claim that at all material times to this suit, the suit property was registered in the names of the Plaintiffs and a title deed to that effect was issued on 7th June 2010. The Plaintiffs further averred that they purchased the suit property from one **John Ndungu Kamau**, for a valuable consideration after conducting due diligence at the Lands Registry. That on 20th May 2011, **Jane Waceke Njoroge**, trespassed into the suit property and caused disruption to the Plaintiffs work ongoing on the suit property. That the Plaintiffs were purchasers for value **without Notice** of any defect in title and had registered their interests in the suit property and acquired a valid Title Deed. The Plaintiffs further averred that they were unaware of any rights held by the 1st Defendant, **Jane Waceke Njoroge**.

The suit was contested by the 1st Defendant, who filed a Defence dated 2nd October 2013, and denied all the allegations made in the Plaint. The 1st Defendant averred that she was the bonafide owner of the suit property being Plot No. RUIRU EAST/BLOCK 1/1661, having acquired the same for value from one **George Mbugua Gatiba**, and was subsequently issued with a title deed dated 24th January 1999, in respect of her interest and the said title deed had neither been surrendered nor cancelled. That the said **Joseph Ndungu Kamau**, who sold the suit land to the Plaintiffs did not have valid title as the 1st Defendant had not transferred the same to him and therefore his purported title was acquired **illegally** and **fraudulently**. That the purchase transaction between the Plaintiffs and the said **Joseph Ndungu Kamau**, was tainted

with **fraud** and **illegality** and therefore the Plaintiffs could not have acquired a valid title. The 1st Defendant proceeded to particularize fraud on the part of the Plaintiffs as follows;

- a. Acting in concert with the said Joseph Ndungu Kamau, in Purported purchase of the suit property.
- b. Purporting that the title deed held by the said Joseph Ndungu Kamau was a valid title to the suit property.
- c. Transferring the suit property pursuant to an invalid title.
- d. Purporting that the said Joseph Ndungu Kamau could pass a valid title to the property.

The 1st Defendant therefore urged the Court to dismiss the suit with costs.

By an application dated **18th Dec 2014**, the 1st Defendant sought leave to amend her Defence to introduce a **Counterclaim** and also introduced parties who were not parties to the original claim. The said application was allowed and the Plaintiffs were also granted concurrent leave to amend the Plaintiff if need be.

Subsequent to the Orders of the Court, the 1st Defendant, **Jane Wacheke Njoroge**, filed an **Amended Defence** and **Counterclaim** dated **18th March 2015**. In the said Amended Defence and Counterclaim, the 1st Defendant, **Jane Wacheke Njoroge**, Counterclaimed against **Joseph Ndungu Kamau**, the Plaintiffs and the **Hon. Attorney General**.

In the said Counterclaim, the 1st Defendant/Counterclaimant averred that on or about **24th January 1999**, she purchased the suit property known as **RUIRU EAST/BLOCK 1/1661 (the suit property)**, from one **George Mbugua Gatiba** who was the registered owner of the said property by virtue of a title deed issued on **17th December 1992**. The Counter Claimant was subsequent to the purchase issued a title deed on **24th January 1999**, by the **Land Registrar, Thika**. That the Counterclaimant after acquiring title took possession of the suit property and has never parted with the same. Further, that her title has never been cancelled nor has she parted with its possession or surrendered the same to any person. That without her consent and knowledge, the Land Registrar, Thika caused another Title Deed dated **8th May 2002**, to be issued to **Joseph Ndungu Kamau**, in respect of the suit property. That the said **Joseph Ndungu Kamau**, is a complete stranger to her and she has never had any dealings with him especially in relation to the suit property. That the acquisition of the suit property by **Joseph Ndungu Kamau**, was **illegal** and *void ab initio* and was characterized by **fraud** on the part of the said **Joseph Ndungu Kamau** and the **Land Registrar, Thika**.

The Counter Claimant particularized fraud on the part of all the Defendants to the Counterclaim individually and jointly.

The 1st Defendant prayed for the following orders in her Counterclaim;

- a. **The Plaintiffs' suit be dismissed with costs**
- b. **A mandatory injunction be issued restraining the 2nd and 3rd Defendants to the Counterclaim from selling, alienating, transferring and/or disposing off the suit property RUIRU EAST BLOCK 1/1661.**
- c. **A permanent injunction be issued restraining the 2nd and 3rd Defendants to the Counterclaim from selling, alienating, transferring and/or disposing off the suit property RUIRU EAST BLOCK 1/1661 or interfering with the Counterclaimant's possession thereof.**
- d. **A declaration be made that the Counterclaimant is the rightful owner of the property known as RUIRU EAST BLOCK 1/1661.**
- e. **A declaration be made that the title deeds dated 8th May 2002, issued by the Land Registrar, Thika to the 1st Defendant to the Counterclaim and the subsequent title issued to the 2nd and 3rd Defendants to the Counterclaim in respect of the property known as RUIRU EAST BLOCK 1/1661, are illegal, null and void ab initio**
- f. **An order be made rectifying the property records in respect of the property known as RUIRU EAST BLOCK 1/1661, by cancelling the title deeds dated 8th May 2002 and 7th June 2010, respectively issued by the Land Registrar, Thika by expunging the entries in respect thereof from the proprietorship section of the property.**
- g. **General damages**
- h. **Costs of the suit**
- i. **Such other order as this Honourable Court may deem fit and necessary to meet the ends of Justice.**

In response to the **Defence & Counterclaim**, the Plaintiffs filed a Reply to Defence and Defence to the Counterclaim dated **17th July 2018**. The Plaintiffs who are also the 2nd and 3rd Defendants to the Counterclaim reiterated the contents of their Plaintiff and proceeded to deny the allegations made in the Counterclaim with some exceptions. The 1st Defendant to the Counterclaim failed to Enter Appearance or file a

Defence and the Counterclaimant made an application for interlocutory judgement to be entered against them. The 4th Defendant to the Counterclaim filed a Defence dated **29th July 2015**, and therein denied all the allegations made in the Counterclaim and put the Counterclaimant to strict proof thereof.

On **9th November 2018**, the Plaintiffs sought leave of Court to amend their Complaint and the same was granted. Subsequently, the Plaintiffs filed an **amended Complaint** dated **25th March 2019**. In the said amended Complaint, the Plaintiffs included **Joseph Ndungu Kamau**, the **Land Registrar, Thika** and **The Hon. Attorney General** as the **2nd, 3rd** and **4th** Defendants respectively.

Further the Plaintiff averred that the **2nd** and **3rd** Defendants fraudulently caused the transfer of the suit land from the names of the **1st** Defendant to the **2nd** Defendant in a deceitful and fictitious manner without following the due process of the law. The Plaintiffs particularized **Fraud** by the **2nd** and **3rd** Defendant as follows;

- a. **The 2nd and 3rd Defendants colluding to transfer land parcel RUIRU EAST BLOCK 1/1661, without following the laid down procedure**
- b. **By the 2nd Defendant effecting transfer of the suit land from the 1st Defendant to the 2nd Defendant without a transfer form duly signed, photos affixed thereon and other completion documents.**
- c. **By the 3rd Defendant acting negligently in the circumstances.**
- d. **By the 2nd Defendant fully knowing that he was not the owner of the suit land, fraudulently causing registration of the same in his name for purposes defrauding the Plaintiff Kshs. 2,000,000/= plus other expenses within the transaction.**

The Plaintiffs averred that they had come to learn in the cause of this suit that the **1st** Defendant also had in her possession a title deed to the suit property and that the acquisition of a similar title by the **2nd** Defendant was questionable. That as a result of the fraudulent actions of the **2nd** and **3rd** Defendants, the Plaintiffs have suffered loss and damage. As a result, the Plaintiffs sought/prayed for the following orders; -

- a. **That the 2nd Defendant be compelled to refund to the Plaintiffs the purchase price of the suit land being Kshs. 2000,000/=.**
- b. **That the 2nd and 3rd Defendants be compelled to pay to the Plaintiffs the market value of the suit property which currently stand at Kshs. 15,000,000/=.**
- c. **That the 2nd and 3rd Defendants be condemned to pay costs of the suit.**

The matter proceeded by way of viva voce evidence wherein the Plaintiffs called one Witness. The **1st** Defendant also called one witness, while **2nd, 3rd** and **4th** Defendants called no witnesses and were absent during the hearing on **8th June 2021**.

PLAINTIFFS' CASE

PW1, David Joseph Gichamba Gichuhi, the **1st** Plaintiff adopted his witness statement dated **29th August 2012**, and his Amended Witness Statement dated **25th March 2019**, as part of his evidence. Further, he adopted his list of documents dated **19th May 2011**, and produced them as **exhibits 1-4**, the list of documents dated **25th March 2019**, was marked exhibits **5-8** and the list of documents dated **26th June 2020**, was marked exhibits **9-15**.

PW 1 stated that he bought the suit land from one **Joseph Ndungu Kamau** for **Kshs. 2, 000,000/=** That at the time of Purchase, the said **Joseph Ndungu Kamau** was in possession of an original title deed for the suit property, and an official search conducted and the Land Registry, Thika confirmed that position. He further stated that once the transaction was concluded, the suit property was registered jointly in his name and that of his wife. That it was not until he was ready to begin construction on his property (suit land) that he became aware of the **1st** Defendant who also laid a claim on the suit land. That he had seen the statement filed by the Land Registrar in respect of the instant suit and he reiterates that there was negligence on the part of the Land Registrar. The **1st** Plaintiff urged the Court to allow the prayers sought in the Amended Complaint dated **25th March 2019**.

DEFENCE CASE

DW1 Jane Waceke Njoroge, the **1st** Defendant herein adopted her statement dated **2nd October 2013**, as her evidence in chief. In addition, she relied on her list of documents, even dated, to buttress her witness statement. She stated that she purchased the suit land from **George Mbugua Gatiba** in **1999**, and subsequently she obtained a title deed for the suit land dated **29th January 1999**. That she has never sold the suit land to anyone after acquiring the same. That she did not know **Joseph Ndungu Kamau**, and she did not sell nor transfer the suit land to him either. That her title was issued at the lands office in Thika and she was not aware how a second title was issued for the same land. That it was not until she went to prepare her land for construction that she became aware of the Plaintiffs and the existence of a **2nd** title deed for the suit land. She urged the Court to make an order in her favour.

The **3rd** and **4th** Defendants were not present in Court on the hearing date and therefore did not participate in the trial. However, they filed a witness statement of **Benard Leitich**, the **District Land Registrar Thika**, dated **26th September 2018**. The said statement stated that

RUIRU EAST/BLOCK 1/1661 came from subdivision No. 181. That the Green Card indicates that the title deed of RUIRU EAST/BLOCK 1/1661 (the suit land) was first issued to Alice Wanjiku Mbugua on 3rd July 1992, but was cancelled and later issued to George Mbugua Gatiba as a gift on 17th December 1992. That on 29th January 1999, an entry was made on the green card being a transfer of RUIRU EAST/BLOCK 1/1661, by George Mbugua Gatiba in favour of Jane Waceke Njoroge, and the supporting documents were also there.

That on 8th May 2002, another entry was made on the Green Card being a transfer in favour of one Joseph Ndungu Kamau, and a title issued on the same day. That in support of that entry, his office cannot trace any supporting documents. That subsequent to the entry, in favour of Joseph Ndungu Kamau, another entry was made and title deed issued in favour David Joseph Gichamba, and Beatrice Wanjiru Gichamba on 25th May 2010. That documents in support of that entry were on the possession of the lands office. That the last entry on the Green Card was a restriction registered on 7th June 2010, lodged by Jane Waceke Njoroge, on the suspicion of fraud on the entry in favor of Joseph Ndungu Kamau.

After *viva voce* evidence, the parties closed their cases and the Court directed that they file their written submissions. The Plaintiffs through the Law Firm of Kanyi Kiruchi & Co Advocates, filed his written submissions dated 15th October 2021, and submitted that from the evidence adduced in Court, the Plaintiffs were bonafide purchasers for value and were unaware of any fraud on the Title of the suit property at the time of purchase. The Plaintiffs relied on the case of *Lawrence P. Mukiri vs Attorney General and 4 Others (2013) eKLR*. The Plaintiffs further submitted that they had proven a case for compensation on a balance of probabilities and relied on the case of *Kenneth Kipruto Chebet vs. Kipkering Murei (2013) eKLR*.

The 1st Defendant/Counterclaimant through the Law Firm of Theuri Wanjohi & Co. Advocates, filed her written submissions dated 4th November 2021 and submitted that she did not transfer the land to the 2nd Defendant and the only possible way he could have acquired the suit land was through fraud which was in collusion with the office of the Land Registrar, Thika. She relied on the case of *Arthi Highway Developres vs. West End Butchery Limited & Others (2015) eKLR*, which held that officials at the Land Registry, who are custodians and issuers of titles by the act of allowing the existence of two different title deeds on the same property were thus participants and/or facilitators in the forgery and thus contributed to the fraud perpetrated to the real owner of the property.

She further submitted that she had a legal right to the suit land and she could not be disposed off the said right by the 2nd Defendant, who was a fraudster. That the Plaintiffs had an equitable right to the suit land as bonafide purchasers for value without notice of fraud, but their right could not take precedence over the legal right of the 1st Defendant. In addition, the 1st Defendant/Counterclaimant relied of the cases of; *Alice Chemutai Too Vs. Nickson Kipkurui Korir & 2 Others (2015) eKLR*; *Alberta Mae Gacii vs. Attorney General and 4 others (2006) eKLR* and *Samuel Odhiambo Oludhe & 2 Others vs. Jubilee Jumbo Hardware Limited & Another (2018) eKLR*.

The Court has carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issues for determination are;

1. Who is the bonafide owner of the suit property
2. Whether the Plaintiffs are bonafide purchasers for value without notice
3. Whether the Plaintiffs are entitled to the orders sought
4. Whether the 1st Defendant is entitled to the order sought in their Counterclaim
5. Who should bear the cost of the suit

(1) Who is the bonafide owner of the suit property

The right to own and acquire property in Kenya is premised on Article 40 of the Constitution of Kenya, 2010. The said Article provides as follows;

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.

...”

Further section 26 (1) (b) of the Land Registration Act states that: “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

From the above provisions of Law, it is clear that the Plaintiffs and the 1st Defendant both have an incontrovertible right to property. While a certificate of title shows that the holder of the same is the **absolute** and **indefeasible** owner of that land, this Court has noted that both the Plaintiffs and the 1st Defendant have title to the suit property as contemplated in **Section 24** read together with **Section 26 of the Land Registration Act, 2012**.

It is not in doubt that both the Plaintiffs and the 1st Defendant lay claim to the suit property (**RUIRU EAST/BLOCK 1/1661**) herein. It is also not in doubt that the Plaintiffs purchased the suit land from the 2nd Defendant who regardless of being a party to this suit, did not participate in the proceedings, despite being duly served with the pleadings. It is also not in doubt that the 1st Defendant just like the Plaintiffs has in her possession an original title deed to the suit land.

When a person’s ownership to property is called into question, it is trite that the said proprietor has to show the root of his ownership. *See the case of Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others [2016] eKLR*, where the Court held that;

‘A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

Further in the case of *Munyu Maina Vs. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Court of Appeal* held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In order to determine who is the bonafide owner of the suit property, the Court should first determine which party has been able to show the root of his/her title.

It is the Plaintiffs evidence that they bought the suit property from one **Joseph Ndungu Kamau**, which evidence is supported by a sale agreement dated **9th April 2010**, a copy of the title deed for the impugned property issued to the Plaintiffs, a copy of the title deed for the suit property issued to the said **Joseph Ndungu Kamau**, a Certificate of official search dated **23rd March, 2010**, duly filled and signed transfer forms between the **Plaintiffs** and **Joseph Ndungu Kamau**, Land Control Board **consent** to transfer dated **13th April 2010**, and a copy of the **Green Card** of the impugned property . Further the PW 1 testified that before and during the purchase of the suit property, he involved an Advocate who conducted due diligence to establish and investigate the title, and it was only after establishing its validity and authenticity that he completed the transaction with the 2nd Defendant herein. In addition, the statement of the **Land, Registrar Thika**, confirmed the evidence given by the PW 1 in Court.

The Court is thus satisfied that the Plaintiffs have been able to show the root of their title. The Court having looked at the Plaintiffs title will proceed to look at and investigate the Title held by the 1st Defendant.

The 1st Defendant in her evidence testified that she acquired the suit land from **George Mbugua Gatiba**, after a successful purchase of the same. She further testified that she was issued with a title deed for the suit property on **24th January 1999**, after completing the requisite

procedures. Further, that since she acquired the suit land in **1999**, she had neither sold the property nor transferred it and she still had in her possession the original title deed issued to her. It was the 1st Defendant's further evidence that she did not know the 2nd Defendant and she had neither transacted with him nor transferred the suit land to him under any circumstance.

The Evidence of the 1st Defendant was corroborated by the documents she produced as exhibits and the statement of the Land Registrar, Thika.

The Court having analyzed the statement and evidence of the 1st Defendant is satisfied that she has been able to satisfactorily show and prove the root of her title. The Court therefore finds that the Plaintiffs and the 1st Defendant having established the root of their titles both hold valid title deeds. The Court is however cognizant of the fact that it is **irregular** and **illegal** for one property to have two different title deeds and will now proceed to investigate the validity of each title deed.

It is not in doubt that the 1st Defendant holds an original title deed to the suit property issued on **24th January 1999**. It is also not in doubt that she acquired the said land from one **George Ndungu Gatiba**, who was the 2nd registered owner to hold the property as per the record held at the lands office. It is also not in doubt that the transfer between the said **George Gatiba** and the 1st Defendant was valid and legally procedural. This was corroborated and confirmed by the **Land Registrar, Thika**, in his statement dated **26th September, 2018**. The Court has no reason to doubt the evidence placed before it by the 1st Defendant and the statement by the **Land Registrar, Thika** which had been filed and which has not been controverted and/or rebutted in anyway.

In the case of **Munyu Maina vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009**, the Court of Appeal stated,

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In relation to the certificate of title held by the Plaintiffs, the Court has noted that the Plaintiffs acquired the suit land from **Joseph Ndungu Kamau**. The Court has further observed, that from the **Land Registrar's** statement the said **Joseph Ndungu Kamau**, acquired the suit land from the 1st Defendant. However his entry in the **Green Card** was not supported by the requisite documents as required by the law. It is therefore the Courts finding that the title held by the 2nd Defendant herein was irregularly and/or fraudulently acquired. Having found **fraud** on the part of the 2nd Defendant, it follows that the title held by him though valid was marred by fraud and illegality and therefore the same could not transfer good title to the Plaintiffs. In the case of **Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR**, the Court rendered itself on this subject thus;

“Decisions abound where Courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalini Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumar Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

Further, in the case of **Peter Njoroge Ng'ang'a vs Statutory Manager for United Assurance Company Limited & Another [2020] eKLR**, the Court stated as follows

“...Article 40 (6) of the Constitution of Kenya which provides that the right to acquire and own property enshrined thereunder does “not extend to any property that has been found to have been unlawfully acquired.”

Based on the above, the Court finds and holds that the 1st Defendant is the bonafide owner of the suit property.

(2) Whether the Plaintiffs are bonafide purchasers for value without notice

The definition of a bonafide purchaser, was defined by the Court in the case of **Lawrence Mukiri ...Vs... Attorney General & 4 Others [2013] eKLR** as

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.*
- b. He purchased the Property in good faith;*
- c. He had no knowledge of the fraud;*

d. The vendors had apparent valid title;

e. He purchased without notice of any fraud;”

It is not in doubt that the Plaintiffs hold a valid **title deed** duly registered in both their names and that they purchased the suit land from the 2nd Defendant in **good faith** and **without notice** of any **defects** on the title as was established in the hearing of this matter. The Court has no reason to doubt the evidence of the Plaintiffs that it was their belief and knowledge at the time they purchased the suit land that the 2nd Defendant had apparent valid title.

In the case of *Elijah Makeri Nyangwara –Vs- Stephen Mungai Njuguna & Another [2013]* the Court held that;

“The evidence in this case puts no one in doubt that the title to the 1st Defendant was obtained illegally, unprocedurally or through a corrupt scheme. The documents that conveyed title to him were forged. The title could not therefore have been obtained legally or procedurally. I am satisfied that the provisions of Section 26 (1) (b) have been met and that the title of the 1st Defendant is liable to be cancelled. I therefore proceed to cancel the title of the 1st Defendant and his registration as proprietor of the suit land. The Plaintiff should be registered as owner of the suit land. It is regretful that the 1st Defendant was snared by the scheme perpetuated by the 2nd Defendant. I sympathise with him but I must ensure that the real title holder is protected and that he is registered as the proper owner of the suit land.”

Further in the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR* the Court held that

*“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows: - “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”*

Having been persuaded by the above findings of the Court, this Court is satisfied on a balance of probabilities that the Plaintiffs are bonafide purchasers for value without notice of the fraud that had been perpetrated by **Joseph Ndungu Kamau**.

(3) Whether the Plaintiffs are entitled to the orders sought

The Plaintiffs had sought for several orders amongst them an Order that the 2nd Defendant be compelled to refund to the Plaintiffs the purchase price of the suit land being **Kshs. 2,000,000/=** and an Order that the 2nd and 3rd Defendants be compelled to pay the Plaintiffs the market value of the suit property which currently stand at **Kshs. 15,000,000/=**.

The Court has already held that although the Plaintiffs were able to prove the root of their title and to show that they were indeed bonafide purchasers for value without notice, they inherited title to the suit property that was blemished by fraud. Though the Plaintiffs and the 1st Defendants certificates of titles were vainly issued by the **Land Registrar Thika**, the 1st Defendant’s title is the first in time and it should thereof prevail.

The title held by the 2nd Defendant and subsequently held by the Plaintiffs was procured unprocedurally as there are no records to show how and when the transfer was done from the 1st Defendant to the 2nd Defendant. The root of the 1st Defendants title dates back to the year **1999**. Even if the two were competing interest, which they are not, the 1st Defendant’s title would still be superior to the one being held by the Plaintiffs. See *Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997*, where the Court held that:

“Where there are two competing titles the one registered earlier is the one that takes priority”

The same position was held in the case of *Gitwany Investment ltd vs. Tajmal Ltd & 3 Others (2006) eKLR* where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

Therefore, this Court finds and holds that the 1st Defendant’s title is the first in time and therefore, she is the rightful owner of the suit property. However, the Plaintiffs innocently purchased the suit property from the 2nd Defendant who was a fraudster. The Plaintiffs are

therefore entitled to a refund of the purchase price of **Ksh. 2 000 000/=** by the 2nd Defendant who wrongly sold the suit property to the Plaintiffs with a defective title.

On the issue of compensation at market value of **Kshs. 15,000,000/=** by the 3rd and 4th Defendants, the Court has already found herein that the Plaintiffs were **bonafide purchasers** for value **without notice** and that they are holders of an equitable right by virtue of being in possession of a valid title deed for the suit property.

The Court notes that the Plaintiffs purchased the suit land from the 2nd Defendant in **2010** for **Kshs. 2,000,000/=**.

The Court also notes that since then about 10 years have passed and the Plaintiffs have not been able to enjoy the quiet possession that should be guaranteed by holding a valid Title Deed. The Court is also cognizant of the fact that the already established fraud on the part of the 2nd Defendant was conducted in liaison with officers in office of the 3rd Defendant.

The Court has perused a Valuation Report filed by the Plaintiffs dated **14th November 2018**. The said Valuation was conducted by **Precision Valuers** and placed the value of the suit property at **Kshs. 15,000,000/=**. The said validity or contents of the said **Valuation Report** have not been controverted or rebutted. Therefore, the Court has no reason whatsoever to doubt the same as no contrary report was availed. This Court therefore proceeds to award the Plaintiffs compensation for the loss suffered at **Kshs. 15,000,000/=** being the current market value of the suit property to be paid jointly and equally by the 2nd and 3rd & 4th Defendants herein.

(4) Whether the 1st Defendant is entitled to the Order sought in their Counterclaim

The Court cannot turn a blind eye and sanitize irregularity and fraudulently acquired properties, all in the name of indefeasibility of title. In the case of **Arthi Highway Developers Limited – Vs – West End Butchery Limited and Others Civil Appeal No. 246 of 2013**, the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs – Justice Moiwo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997** where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the Land Registration Act) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

The Court is empowered under **Section 80 (1) of the Land Registration Act, 2012**, which is a replica of **Section 143(1) of the Registered Land Act Cap 300(Repealed)** to order for rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

This Court has already established that the 1st Defendant is a holder of valid certificate of title and therefore she is the absolute legal owner of the suit property to the exclusion of all others. The 1st Defendant is therefore entitled to the orders sought in the Counter Claim and this Court proceeds to grant the orders sought in the Counterclaim being prayers No. **(b) (c) (d) (e) and (f)** as prayed in the Counterclaim dated **18th March 2015**.

(5) Who should bear the costs of this suit

As provided by **Section 27 of the Civil Procedure Act**, the Court has discretion to grant costs. Costs ordinarily follow the event, unless there are special circumstances. The Plaintiffs and the 1st Defendant herein have partially succeeded in their claims.

For the above reasons, the Court finds that both the Plaintiffs and the 1st Defendant are entitled to costs to be borne jointly and severally by the 2nd, 3rd & 4th Defendant respectively; -

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have been able to establish that they are bonafide purchasers for value without notice of any defect, but are not entitled to the suit property as it was sold to them by a **fraudster**. Further, the 1st Defendant has been able to prove that she is the absolute and indefeasible owner of the suit property.

The end results herein is that the Court enters judgement for the Plaintiffs against the 2nd, 3rd and 4th Defendants in the following terms;

a) The Plaintiffs are entitled to refund of the purchase price of Ksh. 2,000,000/= by the 2nd Defendant with interest at the Court's rate from the date of this suit to payment in full.

b) The Plaintiffs are entitled to compensation of Ksh. 15,000,000/= by the 2nd, 3rd & 4th Defendants being the market value of the suit property.

c) The Plaintiffs are also entitled to costs of this suit to be paid by the 2nd, 3rd & 4th Defendants respectively.

Further, the Court enters Judgement for the Counterclaimant as prayed in the Counterclaim dated **18th March 2015**, in the following terms; -

- a) *A mandatory injunction to issue compelling the Land Registrar to issue to the Counterclaimant with an abstract of the title to the suit property RUIRU EAST BLOCK 1/1661.*
- b) *A permanent injunction restraining the 2nd and 3rd Defendants to the Counterclaimant from in anyway selling alienating transferring or in any way disposing of the property known as RUIRU EAST BLOCK 1/1661 or interfering with the Counterclaimant's possession thereof.*
- c) *A declaration that the Counterclaimant is the rightful owner of the property known as RUIRU EAST BLOCK 1/1661.*
- d) *A declaration that the title deeds dated 8th May 2002, issued by the Land Registrar, Thika to the 1st Defendant to the Counterclaim and 7th June, 2010 issued by the Land Registrar, Thika to the 2nd and 3rd Defendants to the Counterclaim in respect of the property known RUIRU EAST BLOCK 1/1661 are illegal null and void ab initio.*
- e) *An order be issued to rectify the Register in respect of the property known as RUIRU EAST BLOCK 1/1661, by cancelling the title deeds dated 8th May 2002 and 7th June 2010, issued by the Land Registrar, Thika to the 1st Defendant to the Counterclaim and the 2nd and 3rd Defendants to the Counterclaim respectively by expurgating the entries in respect thereof from the proprietorship section of the property.*

The Counterclaimant is also entitled to costs of the Counterclaim to be borne by the 2nd, 3rd and 4th Defendants respectively.

It is so ordered.

Dated, Signed and Delivered Virtually at Murang'a this 27th day of January, 2022.

L. GACHERU

JUDGE

Delivered online:

In the presence of

N/A for the 1st Plaintiff

Mr. Theuri Wanjohi for the 2nd Plaintiff

N/A for the 1st – 4th Defendants

Kuiyaki – Court Assistant

L. GACHERU

JUDGE